United States Court of Appeals

for the Second Circuit

APPENDIX

74-2598

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

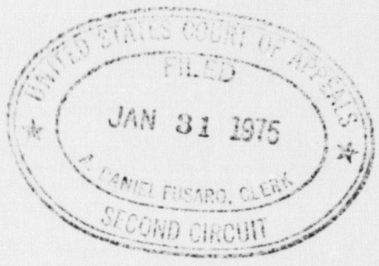
DANIEL REID and
THEODORE E. THOMAS, JR.,

Appellants.

Docket No. 74-2598

APPENDIX TO THE BRIEF
FOR APPELLANT
THEODORE E. THOMAS, JR.

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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THE LEGAL AID SOCIETY,
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FEDERAL DEFENDER SERVICES UNIT
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E. THOMAS BOYLE,
Of Counsel

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D. C. Form No. 100

CRIMINAL DOCKET

JUDGE CORNER

74 CRIM. 968

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	Steven A. Schatten, AUSA.
DANIEL REID	264-6435
THEODORE E. THOMAS, JR.	
	For Defendant:

(01) ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,					
~~Clerk~~ 551.1 & 2					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

18:111-Assaulting Fed. Officer.(ct.1)18:2114&2 Assault & robbery of U.S. property. Ct.2);18:924 Use of firearm to commit felony(ct.3)-18:2112Rob. of U.S. property. (Ct.4)-;18:641 Stealing U.S. property.(Ct.5)18:922,924(a) Interstate transp. of firearm.(Ct.6)-;18:2312 Interstate transp. of stolen motor vehicle.(Ct.7)

DATE	PROCEEDINGS
10-15-74	Filed indictment.
10-18-74	D.REID - Atty.Ronald G.Wohl,present,deft pleads not guilty.
	T.E.THOMAS,Jr. - Atty.John Curley present, Deft refuse to plea - Court enters a plea of not guilty..Suppression hearing held. Motion by Counsel for deft Reid to sever..Dec.Reserved..Both defts Remanded in lieu of bail.
10-21-74	BOTH DEFTS -Atty's present. Motion to sever DENIED
10-22-74	BOTH DEFTS -Atty's present..JURY TRIAL begun.
10-23-74	Trial cont'd.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	DEFENDANT
10-21-74	Trial cont'd.		
10-25-74	Trial cont'd		
10-28-74	Trial cont'd		
10-29-74	Trial cont'd. & concluded...JURY verdict...BOTH DEFTS GUILTY in counts 1.2.3.4.6 & 7. Not guilty count 5...P.S.I. ordered..Sentence date Dec.5,1974 - Both defts Remanded in lieu of bail fixed at $50,000 cash.....Conner,J.		
11-1-74	THEODORE E. THOMAS,JR. - Filed notice of motion to dismiss Ct.1 pursuant to rule 29(a)		
11-1-74	THEODORE E.THOMAS,JR. - Filed Govt's memorandum as to admissibility of evidence...		
12-5-74	DANIEL REID - Filed Notice of appeal from judgment of 12-5-74..Copy given to U.S.Atty. and mailed to deft at 427 West St. NYC, Ronald Gene Wohl 1350 Ave.of Americas NYC. Leave to appeal in forma pauperis granted...Conner,J.		
12-5-74	THEODORE E. THOMAS -Filed Notice of appeal from judgment of 12-5-74..Copy given to U.S.Atty. and mailed to deft at 427 West. St. NYC...Leave to appeal in forma pauperis granted...Conner, J.*****Copy sent to John P.Curley,Esq. 15 Park Row NYC		
12-5-74	DANIEL REID - Filed Judgment(Atty.Ronald G.Wohl,present)The deft is committed for imprisonment for a period of EIGHT YEARS, in Count 1; TWENTY FIVE YEARS, in count 2; SIX YEARS in Count 3; THREE YEARS, in Count 4; TWO YEARS, in Count 6; TWO YEARS, in Count 7... All counts to run concurrently with each other....Further recommendation, under Ti.18, U.S.Code, Section 4082, that if you are sentenced to a State Institution for any offenses committed in the course of the robbery of the Mosholu Liquor Store, in August 1974, that the Atty.Gen'l. designate the State Institution as place of confinement under this sentence.....Present bail continued Pending appeal.....Conner,J.....Ent. 12-6-74---------		

-Sell Pag 3-

DATE	PROCEEDINGS
12-5-74	THEODORE E. THOMAS, JR. - Filed Judgment(Atty.John Curley,present)The deft is committed for imprisonment for a period of EIGHT YEARS, in Count 1; TWENTY FIVE YEARS, in Count 2; EIGHT YEARS, in Count 3; THREE YEARS, in Count 4; TWO YEARS, in Count 6; TWO YEARS, in Count 7. All counts to run concurrently with each other. Further recommendation, under Ti.18, U.S.Code, Section 4082, that if you are sentenced to a State Institution for any offenses committed in the course of the Robbery of the Mosholu Liquor Store, in August 1974, that the Atty.Gen'l. designate the State Institution as place of confinementnn under this sentence....Present bail cont'd. pending appeal.. Conner, J...Ent. 12-6-74---------
12-9-74	Filed order that the U.S.Marshal is authorized to expend the funds necessary to obtain eyeglasses for Theodore E.Thomas,Jr.....Conner, J.
12-19-74	Filed transcript of record of proceedings, dated: OCT. 18 & 21-74
12-19-74	Filed transcript of record of proceedings, dated: OCT. 22, 24, 25-74; OCT. 28 & 29-74.
12-19-74	Filed transcript of record of proceedings, dated: Dec. 5-74.

SAS:ets

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 CRIM. 968

UNITED STATES OF AMERICA :

-v- : INDICTMENT

DANIEL REID and
THEODORE E. THOMAS, JR., : S 74 Cr.

Defendants. :

COUNT ONE

The Grand Jury charges:

On or about the 1st day of August, 1974 in the Southern District of New York, DANIEL REID and THEODORE E. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly and by use of a deadly and dangerous weapon, to wit, a revolver, did forcibly assault, resist, oppose, impede, intimidate and interfere with a person designated in Section 1114 of Title 18, United States Code, to wit, Drug Enforcement Administration Special Agent Patrick Shea, while engaged in and on account of the performance of his official duties.

(Title 18, United States Code, Sections 111, 1114 and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of August, 1974, in the Southern District of New York, THEODORE E. THOMAS, JR., the defendant, aided and abetted by DANIEL REID, the defendant, unlawfully, wilfully and knowingly, did rob

a person, to wit, Drug Enforcement Administration Agent Patrick Shea, having lawful charge, control and custody of property of the United States, to wit, a revolver, of such property, to wit, the said revolver, and in affecting or attempting to effect such robbery, did wound and put in jeopardy the life of the said Patrick Shea by use of a dangerous weapon.

(Title 18, United States Code, Section 2114 and 2.)

B

COUNT THREE

The Grand Jury further charges:

On or about the 1st day of August, 1974 in the Southern District of New York, THEODORE E. THOMAS, JR., the defendant, aided and abetted by DANIEL REID, the defendant, unlawfully, wilfully and knowingly did use a firearm to commit a felony for which he may be prosecuted in a court of the United States.

(Title 18, United States Code, Sections 924(c) and 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 1st day of August, 1974 in the Southern District of New York, DANIEL REID and THEODORE E. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did rob another, to wit, Drug Enforcement Administration Agent Patrick Shea, of personal property belonging to the United States, to wit, a revolver.

(Title 18, United States Code, Section 2112 and 2.)

COUNT FIVE

The Grand Jury further charges;

On or about the 1st day of August, 1974 in the Southern District of New York, DANIEL REID and THEODORE E. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did steal and knowingly convert to their own use a thing of value, to wit, a revolver of the United States and of a department or agency thereof, to wit, the Drug Enforcement Administration, said revolver having a value of more than $100.

(Title 18, United States Code, Sections 641 and 2.)

COUNT SIX

The Grand Jury further charges:

On or about the 4th day of August, 1974, DANIEL REID and THEODORE E. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did transport in interstate commerce, from the Southern District of New York to Portsmouth, Ohio, a stolen firearm, to wit, a revolver, knowing and having reasonable cause to believe that the said firearm was stolen.

(Title 18, United States Code, Sections 922(i), 914(a) and 2.)

COUNT SEVEN

The Gran Jury further charges:

On or about the 4th day of August, 1974, DANIEL REID and THEODORE E. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did transport in

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interstate commerce from the Southern District of New York to Portsmouth, Ohio, a motor vehicle, to wit, a 1972 Pontiac, bearing New York license plate 751BZJ, knowing the same to have been stolen.

(Title 18, United States Code, Sections 2312 and 2.)

FOREMAN

PAUL J. CURRAN
United States Attorney

P.S.I. ordered - Sentence date Dec. 5, 1974 - Both D
Remanded In Lieu of Bail Fixed At $50.000 Cash.

RW

12/5/74 - Deft. Reid, (Atty Present) Sentence - Count 1 - 6 ye
Count 2 - 25 yrs, Count 3 - 6 years, Count 4 - 3 years,
Count 6 - 2 years and Count 7 - 2 years, all counts
to run concurrently with each other

Deft. Thomas, Jr., (Atty Present) Sentence -
Count 1 - 8 years, Count 2 - 25 years, Count 3 - 8 years
Count 4 - 3 years, Count 6 - 2 years and Count 7 - 2 ye
to run concurrently with each other.

The Court's Recommendation As to Both Defts'
Reid & Thomas, Jr. Pursuant to T. 18, U.S. Code,
Sec. 4082, that if you are sentenced to a
State Institution, for any offenses committe
in the cause of the Robbery of the Mosholu
Liquor Store, in Aug. 1974, that the Atty
General designate that State Institution as
place of confinement under this sentence.

Both Defts. Present Bail Continued
Pending Appeal. W.C.C.

RW

Form No. USA-333-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

DANIEL REID and
THEODORE E. THOMAS, JR.,

Defendnat

INDICTMENT

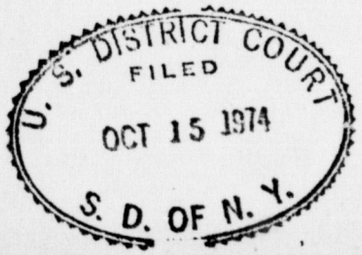
Title 18, Sections 111 2, 2114, 924, 2112, 641, 922, 924(a), 2312. U.S.C.

PAUL J. CURRAN
United States Attorney.

A TRUE BILL

Foreman.

FPI—SS—2-19-71—20M—6950



JUDGE CONNEL.

OCT 18 1974 - DEFT. Reid (Atty Ronald G. Wohl, present)
DEFT. pleads Not Guilty.

DEFT. Thomas, Jr., (Atty John Corley present)
Deft. Thomas, Jr, Refuse to Plea. Court enters
A plea of Not Guilty.

Suppression Hearing Held. Motion By
Counsel for Deft. Reid, to Sever - Dec. Reserved
R&J-D to Oct. 21, 1974. W.C.C. RW

Both Defts Remanded In Lieu of Bail

OCT 21 1974 Both Defts (Attys present) motion to
Sever Denied. Suppression Cont'd & Concluded.
Trial Date. Oct. 22, 1974. Both Defts Remanded
In Lieu of Bail. RW

Oct. 22, 1974. (Both Defts & Attys present) Jury
Trial Begun.

Oct. 23, 1974 - Trial Continued

Oct. 24, 1974 Trial "

Oct. 25, 1974 Trial "

OCT 28 1974 Trial "

OCT 29 1974 Trial Continued & Concluded. ~~Bench~~ Jury
Verdict. Both Defts. Reid & Thomas, Jr. Guilty
In Counts 1, 2, 3, 4, 6 & 7. Not Guilty In Count 5.

(over)

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AFTERNOON SESSION

2:10 p.m.

THE COURT: Mr. Wohl, I understand you have something you want to put on the record?

MR. WOHL: I would like to put something on the record out of the hearing of the jury, if I may, your Honor. That was the remark that I had made to you. It doesn't have to be right at this moment. It can be after your Honor finishes.

There is no urgency on time.

THE COURT: All right.

We now come to that part of the case where all of the evidence is in, the attorneys have presented their arguments and you are about to decide the fact issues in the case. You are the sole and exclusive judges of the issues of fact. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony and the exhibits in the case.

My function at this point is to instruct you as to the law applicable to the case. It is your duty, indeed your sworn duty, to accept the law as I state it to you in these instructions, and to apply it to the facts as you find them. Your verdict is the logical result

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of your application of the law as I explain it to you to the facts as you find them. With respect to any fact matter it is your recollection and yours alone that governs. Anything that counsel either for the Government or for either of the defendants may have said either in his opening statement or in his summation or at any time during the trial is not evidence in the case. And it should not be substituted by you for your own recollection of the evidence.

The only evidence which you should consider is the testimony given by the witnesses on the stand, the exhibits in evidence and the stipulations of fact entered into by counsel. Likewise, anything that I may have said during the trial or might say during the course of these instructions as to any factual matter in evidence is not to be taken by you in lieu of your own recollection.

As I have instructed you several times during the trial the case should be based only upon the evidence and upon nothing else.

As I told you at the outset the Government has the burden of proof in this and in every criminal case. The two defendants are presumed to be innocent until they are proven guilty to your satisfaction beyond a reasonable doubt. The defendants have not taken the stand but you

cannot draw any inference from their failure to take the stand because the Constitution gives them a right to remain silent and that right would be worthless if you could convict them because they did not take the stand and testify in their own defense. They were entitled to remain silent and they did so.

Your decision must be unanimous. That is all 12 of the jurors who will participate in the deliberations must agree to the verdict. And the verdict must be based upon a conclusion of each one of you beyond a reasonable doubt. You may not find either defendant guilty of any of the counts of the indictment if you have a reasonable doubt about the facts which are necessary to constitute the crimes charged. A reasonable doubt can be based either upon evidence or upon a lack of evidence.

A reasonable doubt is such a doubt as would cause you to hesitate to act in a matter of importance in your own life. It is a doubt that a reasonable person has after carefully weighing all the evidence. It is a doubt which appeals to your judgement, your reason, your common sense and your experience. A reasonable doubt is not mere caprice or whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It should not be confused with sympathy for either or both defendants. Thus, speculative or imaginary qualms or misgivings are not reasonable doubts.

It is not necessary for the Government to prove the guilt of a defendant to a mathematical certainty or beyond all possible doubt. If that were the rule few would ever be convicted no matter how guilty they might be. The reason is that in the practical world it is impossible for a person to be absolutely and completely certain of any controverted fact unless that fact happens to be susceptible of mathematical proof.

In consequence the law is such that in a criminal case it is enough that a defendant is proved guilty beyond a reasonable doubt. He does not have to

be proved guilty beyond all possible doubt. If after a fair, impartial and careful consideration of all the evidence you are convinced of the guilt of a defendant beyond a reasonable doubt you must convict regardless of what your personal feelings may be, regardless of any sympathy you may have for him and regardless of what you think about the law or regardless of any other personal biases or prejudices you may have.

If, on the other hand, after a fair, impartial and careful consideration of all the evidence you do have a reasonable doubt as to a defendant's guilt with respect to a particular charge you must acquit him or find him not guilty of that charge.

Now, let's turn to the indictment itself. As I told you at the outset an indictment is merely a charge. It is a statement of what the Government accuses these defendants of and what it expects to prove at the trial. It is not evidence in the case. The indictment in this case charges seven separate crimes stated in seven separate counts. Each count charges a separate crime and each must be considered separately. You may find a particular defendant guilty on all counts, not guilty on all counts or guilty on some counts and not guilty on others. The indictment here names two defendants, both

of whom have been on trial here. In the determination of innocence or guilt you must bear in mind that the guilt of each of these two defendants is a personal matter. The guilt or innocence of one defendant must be determined separately with respect to him solely on the evidence presented against him or the lack of such evidence. The case of each defendant stands or falls on the proof or lack of proof of the charge against him and not on the basis of the charge against someone else or the proof or lack of proof with respect to that charge.

Count 1 of the indictment reads as follows:

"The Grand Jury charges: On or about the 1st day of August, 1974 in the Southern District of New York Daniel Reid and Theodore E. Thomas, Jr., the defendants, unlawfully, willfully and knowingly and by the use of a deadly and dangerous weapon, to wit, a revolver, did forcibly assault, resist, oppose, impede, intimidate and interfere with a person designated in Section 1114 of Title 18 United States Code, to wit, Drug Enforcement Administration Special Agent Patrick Shea while engaged in and on account of the performance of his official duties."

In this count, the defendants are charged with having violated Section 1114 of Title 18 of the United States Code, which reads in pertinent part as follows:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in Section 1114 of this article while engaged in or on account of the performance of his official duties," is guilty of a crime.

And provides further that:

"Whoever in the commission of such acts uses a deadly or a dangerous weapon," is guilty of an aggravated form of that crime.

As you will note, the statute section which I just read you refers to Section 1114 of Title 18 of the U . S. Code. That section refers, among others, to an officer or employee of the Drug Enforcement Administration. Reading the two sectinns together, then;

An assault involving the use of a dangerous or deadly weapon on a special agent of the Drug Enforcement Administration engaged in the performance of his official duties constitutes a Federal crime.

Therefore, in order to find a defendant guilty of the crime charged in Count 1, you must find the following facts beyond a reasonable doubt:

First, that on or about August 1, 1974, Patrick Shea was employed by the Drug Enforcement Administration;

second, that on that same date the defendant forcibly assaulted or resisted or opposed or impeded or intimidated or interfered with Patrick Shea;

third, that in so doing the defendant used a deadly or dangerous weapon;

fourth, that the defendant willfully did the act or acts charged; and

fifth, that at that time Patrick Shea was engaged in the performance of his official duties.

I have used the terms of the statute there, namely, that the defendant allegedly "forcibly assaulted or resisted or opposed or impeded or intimidated or interfered with" Patrick Shea. You are instructed that it is not necessary that the Government prove that the defendant did all of those things, that is, assaulted or resisted or opposed and so forth. It is sufficient if the Government proves beyond a reasonable doubt that any one of these several alternative acts was proved as charged.

To further assist you in determining whether that statute has been violated, I will define a number

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of the other terms of the statute.

An "assault" is defined as an unlawful attempt or offer with force and violence to do injury to the person of another, with such apparent present possibility of carrying out such attempt as to put the person against whom the attempt was made in fear of personal violence.

The word "resistance" is defined as opposing by physical power, scribing against, exerting one's self to counteract, defeat or frustrate.

The word "opposed" means to resist by physical means.

"Impede" is defined as stopping progress, obstructing or hindering.

"Intimidate" means to make timid or fearful, to inspire or affect with fear, to frighten, to deter or over awe.

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Now, you will note also that the statute refers to "a deadly and dangerous weapon."

A loaded revolver is both a deadly and a dangerous weapon.

You will note also that in listing the elements that must be proven, one was the fact that at the time of the alleged assault Shea was an employee of the Drug Enforcement Administration engaged in the performance of his official duties. Section 6641.5 of the Drug Enforcement Administrative Agents' Manual reads in pertinent part:

"Should an agent happen to witness a state violation, whether he is on or off duty, the administrator of the Drug Enforcement Administration expects him to take reasonable action as a law enforcement officer to prevent the crime and/or apprehend the violator. This policy applies only to felonies or violent misdemeanors."

While not conceding in any way their knowledge or participation in the alleged crimes, defendants have stipulated and agreed that at the time Special Agent Shea entered the Mosholu Liquor Store on August 1, 1974, at about 4:00 p.m., a felony or a violent misdemeanor was taking place inside the liquor store and that this fact was readily apparent to Special Agent Shea.

Another element of the offense which I listed

was the requirement that Special Agent Shea be an employee of the Drug Enforcement Administration, and that he be acting in the course of his official duties. It is not disputed here that Special Agent Shea was at the time of the events that took place in the Mosholu Liquor Store on August 1st an employee of the Drug Enforcement Administration.

What you must determine is whether or not in entering the liquor store and attempting to interrupt the performance of the felony or violent misdemeanor which he observed taking place at that time he was acting within the scope of his official duties. In determining this you should consider the special agents manual which I read to you. You should also consider whether or not Shea was acting within the scope of the instructions given in that manual. I instruct you that as a matter of law if Agent Shea was engaged in a personal frolic, if he was acting purely as a private citizen, then he was not engaged in the scope of his official duties at the time he entered the liquor store.

I further charge you that it is not necessary that either defendant know the identity of Shea or know that Shea was a federal officer or that he was engaged at the time in the performance of his official duties.

It is sufficient that you find that these defendants intended to perform the acts which are charged upon a man who in fact was a federal agent engaged in the performance of his official duties, and you need not consider whether they knew he was in fact such agent engaged in official duties.

The Government charges here that the assault on Special Agent Shea was perpetrated by the Defendant Thomas. The Government, however, charges the Defendant Reid with responsibility for the assault on the special agent on the ground that Reid was allegedly aiding and abetting the Defendant Thomas in the robbery of the liquor store, and that the assault on Agent Thomas was a reasonably foreseeable consequence of the robbery of the liquor store.

If you find beyond a reasonable doubt that the Defendant Reid knowingly and wilfully aided and abetted Defendant Thomas in the assault on Agent Shea you may convict him of the assault charge even though he did not personally perpetrate the assault.

It is not necessary for the Government to show that the Defendant Reid personally assaulted or wounded Agent Shea with a deadly or dangerous weapon.

I should refer to Section 2 of Title 18 of the U.S. Code which reads in part, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

The principal is the one who commits the offense and this statute provides that anyone who aids, abets, counsels, commands, induces or procures the commission of an offense by the principal is punishable just the same as if he were the principal committing the offense.

In order for a defendant to aid and abet another to commit a crime it is necessary that he knowingly, wilfully and intentionally associate himself in some way with the criminal enterprise, that he wilfully participate in it as something he wishes to bring about, and that he wilfully seek by some action of his own to makeit successful.

Mere presence and guilty knowledge on the part of a defendant that a crime is being committed is not sufficient unless you are convinced beyond a reasonable doubt that the defendant was doing something to assist the crime, that he was a participant rather than merely a knowing spectator.

However, in order for you to convict it is not necessary that you find that a defendant himself did all the acts. If he knowingly, wilfully and intentionally caused an act to be done which if he had performed himself would be an offense against the United States then you may consider him just as guilty as if he had performed the act himself.

This participation by a defendant may be shown by any act even of relatively slight importance which you find was performed by a defendant and which involved his participation in the crime. Evidence of a defendant's participation may be either direct or circumstantial. As I will tell you later, circumstantial evidence is evidence of one fact from which you may logically infer the existence of another fact.

It is sufficient that the Government establish either by direct or circumstantial evidence beyond a reasonable doubt that the defendant in question showed by what he said or did or how he sought to help the

success of the crime that he did so knowingly, wilfully and intentionally.

Throughout my instruction I will refer again and again to the words unlawfully, wilfully and knowingly. These words mean that you must be satisfied beyond a reasonable doubt that the defendant whose guilt you are considering knew what he was doing and that he did it deliberately and voluntarily as opposed to doing it mistakenly or accidentally or as a result of coercion. It is not necessary that the defendant knew that he was violating any particular law. It is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

Knowledge and intent exist in a person's mind;since it is never possible to read a person's mind and to know what he was actually thinking, the only way you have for determining what he was thinking was by what he did or what he said and by all of the other facts and circumstances surrounding the acts in question.

Knowledge and intent may be inferred from his acts and from all of the other surrounding circumstances.

Now, let's turn to Count 2 of the indictment. "The grand jury further charges: On or about the 1st day of August 1974 in the Southern District of New York

Theodore E. Thomas, Jr., the defendant, aided and abetted by Daniel Reid, the defendant, unlawfully, wilfully and knowingly did rob a person, to wit, Drug Enforcement Administration Agent Patrick Shea, having lawful charge, custody and control of property of the United States, to wit, a revolver, of such property, to wit, the said revolver, and in effecting or attempting to effect such robbery did wound and put in jeopardy the life of the said Patrick Shea by the use of a dangerous weapon."

That count charges a violation of Section 2114 of Title 18 of the United States Code which reads in part as follows:

"Whoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States with the intent to rob, steal orpurloin such mail matter, money or other property of the United States or robs any such person of mail matter or of any money or other property of the United States and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money or other property of the United States or puts his life in jeopardy by the use of a dangerous weapon he commits a crime."

That is complicated and I will break it down

into the elements that must be established by the Government in order to make out the offense charged in Count 2.

In order to find the defendant Thomas guilty of the crime charged in Count 2 you must find beyond a reasonable doubt; First, that Patrick Shea had a lawful charge, control, or custody of property of the United States which was robbed.

Second, that the defendant robbed such property, to wit, a revolver which was the property of the United States.

Third, that in effecting such robbery the defendant wounded Patrick Shea or put his life in jeopardy by use of a dangerous weapon. If you find each of these foregoing three elements beyond a reasonable doubt as to the defendant Thomas in order to find the defendant Reid guilty of the crime charged in the second count you must also find beyond a reasonable doubt that defendant Reid knowingly and willfully aided and abetted defendant Thomas in the robbery of Shea's revolved and in the assault, or that the robbery and the assault were performed as part of a joint venture which I will explain to you more fully in a moment.

If, on the other hand, you do not find that the defendant Thomas was guilty of each and every one of the elements of the offense, that is that all three of those elements were present, then you must necessarily find that

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the defendant Reid was not guilty of the charges in the second count of the indictment.

In other words, you cannot find the defendant Thomas not guilty on Count 2 and find the defendant Reid guilty. If you find the defendant Thomas guilty you must find the defendant Reid not guilty with respect to Count 2.

Now, the first element of this charge in the second count involved lawful custody, charge or control of a firearm which was the property of the United States. Let's examine these terms separately.

The term "custody" means the care and keeping of a thing. Where the thing is an item of property it means such a relation toward it as would constitute possession if the person having custody had it on his own account. The word "charge" means that a person is responsible for a thing or has a duty or obligation imposed upon him with respect to that thing. The word "control" means that a person has the right to exercise a directing or governing influence over the thing in questinn.

As used in the statute, these three words are modified by the necessity that the taking of the revolver must be by robbery. Thus, such taking or attempt to take must occur in the presence of the person who has the custody, charge or control of the revolver. Thus,

for the revolver to have been taken by robbery as prohibited by Section 2114 it must have been taken or have been attempted to be taken out of the possession or physical custody or charge of the lawful custodian or in his presence.

In other words, while the revolver was in his control though not necessarily in his physical or manual possession.

The second element that must be proved beyond a reasonable doubt with respect to Count 2 is that Thomas took the revolver by robbery. The term "robbery" is defined as the unlawful taking of property from the possession of a person against his will by means of actual or threatened force or violence or fear of injury immediate or future to his person or property. Insofar as this element is concerned what I have previously said about the words knowing, willfully and intentionally applies equally to the question of robbery. It is not necessary that the Government prove that either or both defendants knew that the revolver in question belonged to the United States.

The third element that must be proven beyond a reasonable doubt with respect to Count 2 is that the defendant Thomas wounded Patrick Shea or put his life

in jeopardy by the use of a dangerous weapon. In order to satisfy this element the Government must prove beyond a reasonable doubt either that Shea was wounded or that his life was put in jeopardy by the use of a dangerous weapon. The Government need not prove both wounding and jeopardy, either one or the other will suffice.

There has been evidence that the defendant Thomas shot Shea in the arm. Even though there appears to be no dispute that Shea was shot you must still be convinced beyond a reasonable doubt that he was wounded and that the defendant Thomas wounded him. In order for a person's life to be put in jeopardy you must be convinced beyond a reasonable doubt that the person was actually in danger of being killed. Mere fear or apprehension on the part of a person that he might be killed would not suffice. Putting a person's life in jeopardy requires a true state of danger and not a mere sensation of fear.

Again, in order to prove the defendant Reid guilty of the offense charged in Count 2, you must find either that he aided and abetted the defendant Thomas in the commission of the crime charged or that there was a joint venture between them, as I will explain in a moment.

I have already defined aiding and abetting and what I said in my previous definition will apply to

Count 2 and to all the other counts as to which the defendant in question is charged with aiding or abetting the other defendant or someone else.

Now, let's turn to Couht 3 of the indictment. It reads:

"The Grand Jury further charges on or about the first day of August 1974 in the Southern District of New York Theodore E. Thomas, Jr., the defendant, aided and abetted by Daniel Reid, the defendant, unlawfully, willfully and knowingly did use a firearm to commit a felony for which he may be prosecuted in a Court of the United States."

That count charges a violation of Section 924(c) of Title 18 of the United States Code, which reads:

"Whoever uses a firearm to commit a felony which he may be prosecuted in a court of the United States", commits a crime.

Of course, the aiding and abetting statute which I read you earlier also applies insofar as the third count applies to the defendant Reid.

Now, let us look at the elements which the Government must prove beyond a reasonable doubt in order to secure a conviction of either defendant on Count 3.

First, that the defendant Thomas used a firearm during the course of the assault charged in the first count or during the robbery and assault charged in the third count or during the robbery of Shea's Government-issued revolver charged in the fourth count or during the stealing of Shea's revolver as charged in the fifth count. Therefore, if you find the defendants not guilty on the first, second, fourth and fifth counts, you must necessarily find them not guilty on this count, the third count, because this count involves the use of a gun in committing a crime such as is charged in the other of the first five counts. So, if you find the defendants not guilty as to the other counts, you must find the defendants not guilty

as to the third count.

If, however, you find either defendant guilty on the first or the second or the fourth or the fifth count, then you must consider the third count, because each of the offenses charged in the first, second, fourth, and fifth counts are crimes which may be prosecuted in a Federal Court.

So the first additional element that you must consider in ruling on the third count is whether the defendant used a firearm in connection with the offense charged in one of the other counts.

A firearm is defined as any weapon which is designed to expel a projectile by the action of an explosive. You must decide whether either defendant knew that he was using a firearm, and that he was not using it as a result of carelessness, negligence or because of some other innocent reason. And you must further find beyond a reasonable doubt that the defendant in question was using the firearm to commit one of the other felonies charged in Counts 1, 2, 4 or 5.

The Government charges here that the defendant Thomas used a firearm, in fact that he used two firearms. First the firearm with which he held up Agent Shea, and after he had taken Agent Shea's weapon away from him,

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he also used Agent Shea's weapon. In both instances it is the defendant Thomas who is charged with using a firearm.

The defendant Reid is charged with aiding and abetting the defendant Thomas in the offense charged in Count 3. So in order to find the defendant Reid guilty of the offense charged in Count 3, you must necessarily find that the defendant Thomas has been guilty of that offense and must further find that the defendant Reid aided and abetted in the commission of that offense, and the terms "aiding and abetting" are defined for this purpose exactly the same as they were defined in connection with Counts 1 and 2.

Again, you must find all of the elements of Count 3 as to a particular defendant beyond a reasonable doubt. If you fail to find any one of the elements with respect to a particular defendant beyond a reasonable doubt, then you must acquit that defendant with respect to that count.

Now, let us turn to Count 4. It reads:

"The Grand Jury further charges:

"On or about the 1st day of August 1974, in the Southern District of New York, Daniel Reid and Theodore E. Thomas, Jr., the defendants, unlawfully,

and knowingly did rob another, to wit, Drug Enforcement Administration Agent Patrick Shea of personal property belonging to the United States, to wit, a revolver."

This count charges an offense under Section 2112 of Title 18 of the United States Code, which reads in part as follows:

"Whoever robs another of any kind or description of personal property belonging to the United States," is guilty of a crime.

Now, let's turn to the elements of this offense. In order to find the Defendant Thomas guilty of the crime charged in the fourth count of the indictment, you must find beyond a reasonable doubt.

First, that Patrick Shea had lawful possession of a revolver belonging to the United States which was the subject of the robbery.

Second, that Defendant Thomas robbed the revolver.

Third, that the Defendant Thomas did so knowingly and wilfully, as I have previously defined those terms.

And again, if you find that the Defendant Thomas was guilty on Count 4, that is, if you find the existence of all three of those elements, in order to find the Defendant Reid guilty you must also find that the Defendant Reid knowingly and wilfully aided and abetted the Defendant Thomas in the robbery of the revolver. And again those terms "aiding and abetting" mean exactly the same as I previously defined them.

For purposes of Count 4, the term "robbery" means exactly the same as I previously defined it, that is, the unlawful taking of property from the person or possession of a person against his will by means of actual or threatened force or violence or fear of injury, immediate or future, to his person or property.

Let's turn to Count 5 of the indictment. It reads:

"The Grand Jury further charges:

"On or about the 1st day of August 1974 in the Southern District of New York, Daniel Reid and Theodore E. Thomas, Jr., the defendants, unlawfully, wilfully and knowingly did steal and knowingly convert to their own use a thing of value, to wit, a revolver of the United States and of a department or agency thereof, to wit, the Drug Enforcement Administration, said revolver having a value of more than $100."

This count charges a violation of Section 641 of Title 18 of the United States Code which reads in part:

"Whoever steals or knowingly converts to his use or the use of another a thing of the United States or of any department or agency thereof, having a value of more than $100," is guilty of a crime.

Let's turn now to the elements of the offense

charged in Count 5. In order for the Government to convict either defendant of the offense charged in Count 5, it must prove the following three elements beyond a reasonable doubt.

First, that Defendant Thomas stole and knowingly converted to his own use a revolver belonging to the United States or a department or agency thereof, that is, the .38 caliber Smith & Wesson revolver, Government's Exhibit 1;

Second, that the Defendant Thomas did so knowingly and wilfully, as I have previously defined those terms;

Third, that the value of the .38 caliber Smith & Wesson revolver was more than $100.

In addition, in order to find the Defendant Reid guilty of the offense charged in Count 5, you must find that he knowingly and wilfully aided and abetted the Defendant Thomas in stealing and converting to his own use the .38 caliber revolver belonging to the United States.

Again, the terms are as I have previously defined them.

The first element which I mentioned in connection with Count 5 involves the word "stole." The words "stole" or "stolen," as used in the indictment and in the statute, are defined to include all felonious takings of United States Government property with the intent to deprive the

Government of the rights and benefits of ownership.

Another element which you must find beyond a reasonable doubt is that the Smith & Wesson.38 caliber revolver, Government's Exhibit 1, was the property of the United States or of a department or agency thereof. I charge you that the Department of Justice is a Department of the United States and that the Drug Enforcement Admininstration is an agency within the meaning of the statute.

However, you still must find beyond a reasonable doubt that the revolver in question was the property of the Government or of the Drug Enforcement Administration.

Another element of Count 5 which you are required to find beyond a reasonable doubt in order to convict a defendant under this count is that the value of the revolver exceeds $100. The word value as used in the statute means market value or cost price, in this case the retail market value or so-called street value or the actual retail purchase price, whichever is greater.

In determining the market value or street value you must consider the retail sales price of the revolver at the time it was taken and you must further consider the age of the revolver and the condition of the revolver at the time it was taken.

The value of the revolver is a question of fact to be determined solely by the jury.

Before I turn to Counts 6 and 7, which involve the interstate transportation of the stolen automobile and the stolen revolver, or I should say the alleged interstate transportation of each, I will explain to you a little further the matter of joint venture which I referred to briefly earlier in my discussion of aiding and abetting.

Apart from being an aider and abettor there is another basis upon which you may find the Defendant Reid guilty on Counts 1 through 5 and that is joint venture. The Government contends that the Defendant Daniel Reid knowingly and wilfully entered into a joint venture or joint enterprise with the Defendant Thomas, The purpose of which was to perpetrate armed robbery against the Mosholu Liquor Store,and that the assault and wounding of Agent Shea and the robbery of Shea's government issued service revolver was a reasonably foreseeable consequence of the carrying out of that crime.

Of course, Reid didn't have to know the identity of the people who were going to be hurt or robbed. The Government's theory is that Thomas and Reid planned a robbery of whoever happened to be in the liquor store at the time and in the course of the robbery to use whatever force and violence was necessary to complete the robbery and to effect their escape.

The law is that if a person knowingly and wilfully embarks with another upon a criminal enterprise he is guilty of any reasonably foreseeable criminal act that is done in pursuance of that enterprise even though he himself did not commit the act or was not even present when it was committed and even though he had no intention that such a specific act be done.

Thus in the instant case it is not necessary that the Defendant Reid knew or intended that anyone would be shot or that anyone's revolver would be taken. It would be enough if you are satisfied beyond a reasonable doubt that the shooting and/or the taking of the revolver were reasonably foreseeable consequences of the plan on which both men knowingly and wilfully embarked.

However, you must be satisfied beyond a reasonable doubt that the joint enterprise had the commission of a crime as its objective. If they set out on an innocent mission and a crime unforeseeably was committed by one of them the other would in no wise be responsible for it.

It is only if you find that their joint enterprise had as its objective the perpetration of a crime and further find that the acts in question were done in reasonably foreseeable consequence of the original plan that you may find the non-committing defendant guilty of the act in

question.

Moreover, you must find an intent to commit a specific crime, not merely a decision to embark upon a general course of criminal conduct. In this case you must find that there was a plan to commit a felony or violent misdemeanor in the Mosholu Liquor Store.

Armed robbery would be such a felony and if you find that there was a plan between these two defendants to commit an armed robbery in the liquor store that would suffice as far as establishing the requisite criminal intent of the joint enterprise.

But you must find that they entered there with the intent to commit the robbery or some other felony or violent misdemeanor.

You must also find that both defendants wilfully and knowingly associated themselves with that particular plan to commit the felony or violent misdemanor. Merely showing that one defendant knows the other or that he was present at the time is not enough insofar as the joint venture basis of responsibility on the part of the Defendant Reid is concerned.

A person can't innocently associate with another and merely stumble into a criminal enterprise and be found guilty on the basis of a joint venture. He must have

deliberately agreed to embark on that enterprise.

When I refer to a deliberate agreement or knowing or wilful association with the criminal enterprise I don't mean to suggest to you that you must find a specific written or even a specific verbal agreement between the two defendants.

You may conclude that there was a joint venture on the basis of what actually happened, that is circumstantial evidence as I will define that term a little later of their intent. It is up to you to decide on the basis of all the circumstances including what the defendants did or what you find them to have done that you may conclude what their intent was or what their plan was.

Every day in your lives you judge peoples' actions or their plans or intentions by what you see them do. So here it is up to you to determine what the plans and intentions of these defendants were from such acts as you find that they have done.

Again, you must find that they are the ones who did it. And you must find that beyond a reasonable doubt.

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Thus, from all of the evidence, all of the surrounding circumstances, you are satisfied that the defendant Reid entered upon a criminal enterprise with Thomas the object of which was to perpetrate a robbery of a liquor store and further find that the wounding of the Agent Shea and/or the robbery of Shea's revolver were reasonably foreseeable consequences of that enterprise, then you should convict Reid of any of the crimes of which you have found Thomas guilty.

However, if you have a reasonable doubt as to either Reid's aiding or abetting Thomas or as having agreed on a criminal plan you must find the defendant Reid not guilty as to the count in question. And, of course, as to either defendant unless you find the eixtence of each one of the requisite elements of a particular count, you must find both defendants not guilty with respect to the offense charged in that count.

Let's turn to Count 6. It reads:

"The Grand Jury further charges on or about the 4th day of August 1974 Daniel Reid and Theodore E. Thomas, Jr., the defendants, unlawfully, willfully and knowingly did transport in interstate commerce from the Southern District of New York to Portsmouth, Ohio, a stolen firearm, to wit, a revolver, knowing and having reasonable

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cause to believe that the said firearm was stolen."

Count 6 charges a violation of Sections 922(i) and 914(a) and 2 of Title 18 of the United States Code.

Section 922(i) which is charged to have been violated in Count 6 reads in part as follows:

"It shall be unlawful for any person to transport or ship in interstate or foreign commerce any stolen firearm knowing or having reasonable cause to believe that the firearm or ammunition was stolen."

Now let's turn to the elements of the offense charged in Count 6. In order for the Government to convict either defendant of the crime charged in Count 6 it must prove each of the following elements beyond a reasonable doubt:

First, that on or about August 4, 1974 the defendant transported or shipped in interstate commerce from the Southern District of New York to Ohio a stolen firearm.

Second, that he did so willfully and knowingly, as I previously defined those terms, and, third, that the defendant knew or had reasonable cause to believe that the firearm was stolen.

With respect to knowing or having reasonable cause to believe that the firearm was stolen, if you find

beyond a reasonable doubt that the defendant was in possession of a firearm which had been recently stolen in another state you may, but need not necessarily infer that the defendant knew that the firearm was stolen and that he also had transported it in interstate commerce.

You may further infer even that that defendant participated in the original theft. The test there is whether or not the defendant in question was in possession of a firearm which was recently stolen in another state. The term recently is a relative term which has no fixed meaning. Whether property may be considered recently stolen depends upon the nature of the property and of all the facts and circumstances as shown by the evidence. The longer the period of time since the theft the weaker the inference that the defendant in possession of the property knew it was stolen and still weaker, the inference that he participated personally in the theft. It is solely for you to determine whether or not the firearm in question here had been recently stolen at the time it was found in the possession of the defendants in Ohio.

Now, let us turn to the final count, Count 7, which reads:

"The Grand Jury further charges:

"On or about the 4th day of August 1974, Daniel Reid and Theodore E. Thomas, Jr., the defendants, unlawfully, willfully and knowingly did transport in interstate commerce from the Southern District of New York to Portsmouth, Ohio, a motor vehicle, to wit, a 1972 Pontiac bearing New York license plate 751BZJ, knowing the same to have been stolen."

That count charges an offense under Section 2312 of Title 18 of the U. S. Code, which reads in part:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft knowing the same to have been stolen" is guilty of a crime.

One of the elements which must be proven beyond a reasonable doubt in order for you to return a verdict of guilty as to Count 7 is the transportation in interstate commerce. The term "interstate commerce" includes commerce between one state and another state. Whoever drives an automobile under its own power from one state to another transports that motor vehicle in interstate commerce.

The Government here contends that because the

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car was stolen in New York and recovered in Ohio, you can infer that someone transported it in interstate commerce. I think there is no dispute that the automobile in question here was indeed transported in interstate commerce. However, you still must be satisfied beyond a reasonable doubt that these defendants transported the automobile in interstate commerce.

The next element which you must find is that the automobile was stolen. Again, the word "stolen" means just as I defined it to you previously in connection with the revolver, that is, taken with the intent to deprive the owner of the rights and benefits of ownership.

And again, possession of an article, in this case the automobile which has been recently stolen, if that possession is not satisfactorily explained, is a circumstance from which you may reasonable infer that the person in possession of the automobile, or persons, if more than one is in possession, knew that the automobile had been stolen or even that they participated in its theft. Again, the term "recently" is a term which you will have to determine from your own knowledge and experience.

The longer the period between the theft of the automobile and its possession by a particular

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defendant, or by both defendants, then the weaker the inference that they knew it was stolen; and still weaker, the inference that they participated in the theft.

I charge you with respect to inference without meaning to indicate to any conclusion of my own one way or the other with respect to whether or not there is proof of the actual theft.

Now, the Government in this case contends that it has proven the actual theft by these defendants of the automobile and of the revolver. By charging you with respect to the inference you may draw from possession of a recently stolen object, I do not mean to give you the impression that I feel the Government has not carried its burden of proof with respect to proving that these defendants actually themselves stole the automobile and the revolver. That is something that you will have to determine based on your recollection of the evidence in the case.

As you recall, it is the Government's contention that the Defendant Reid was driving the car at the time it was recovered in Ohio.

However, the Government contends that since both defendants were in the automobile at the time both were in possession of the automobile, and you will have to determine whether or not both were in possession. If you find, for example, that only the Defendant Reid was in possession of the automobile, then you must determine whether or not he was aided or abetted in transportation of the automobile in interstate commerce by the Defendant Thomas in order to determine whether or not the Defendant Thomas was guilty of the offense charged in Count 6.

Or you must find, if you don't find that Thomas aided and abetted Reid in this respect, that there was a joint venture between them of which the interstate transportation of the vehicle was either an originally planned part or was a logical consequence and foreseeable consequence of the other things that were done as a part of the original plan.

The Government in this case is relying upon identification testimony, the identification testimony particularly of Agent Shea and of Mr. Barry. It is the duty of the Government in this case to prove the identification

of these particular defendants as the perpetrators of the crime charged. The Government must prove their participation beyond a reasonable doubt.

Again, the Government doesn't have to prove the participation of both defendants. Their participation must be determined on an individual basis.

If the Government fails to prove beyond a reasonable doubt the participation of a particular defendant, then that defendant is entitled to a verdict of not guilty on the counts as to which his identification is in question.

You should determine the question of the identification of a defendant not only by the direct testimony, but also by all of the circumstantial evidence in the case. And I will define circumstantial evidence in a moment.

It is for you to determine from all of the evidence, both direct and circumstantial, whether a defendant participated in the particular crime charged in a particular count.

Now, as I mentioned, we have eyewitnesses to the alleged crimes in this case. With eyewitness testimony, as with all other testimony, you are the sole judges of the reliability and the credibility of that evidence. In assessing the weight to be given to eyewitness testimony, you should consider all of the circumstances reflected by

the evidence, for example, concerning the opportunity of the witness to observe the defendant's face, the time he had to observe it, the lighting conditions. All of the other surrounding circumstances including the incentive which the witness had to take a good look at the suspect. And all of the other circumstances which your common sense tells you might effect the ability of the witness to recall what a suspect looked like.

Moreover, you should consider whether or not the witness' identification of a witness here in court has been unreasonably or unfairly influenced by things that happened between the time he saw the suspect at the scene of the crime and his testimony in court.

You should consider, for example, whether the recollection that the witness might have of the appearance of the suspect has been affected by having seen a photograph of the defendant between the time of commission of the crime and the testimony of the witness in open court.

You should also consider whether the identification was unfairly influenced by the viewing of the defendant in a lineup by the witness and the circumstances of both the photographic identification procedure or the lineup, whether or not the photograph was shown in such a way as to unfairly suggest to the witness that this man is the one who is suspected of the crime.

Whether or not in the case of photographic identifications there were other photographs presented and whether those other photographs were sufficiently similar both as to photographic quality and as to the general appearance of the subject of the photographs that there was no improper suggestion to the witness that a particular photograph among those shown pictured the defendant in question.

As to the lineup, again your test should be whether or not the lineup procedure was such as to unfairly suggest that a particular person in the lineup was the one suspected by the police. In this connection we have an unusual situation herein that according to the testimony one of the defendants ducked his head, refused to hold up his head so that his face could be seen in the lineup.

This resulted in police officers upon direction of the Court holding up the head of the man in question

so that his face could be seen. Insofar as the holding up of the man's head by a police officer is concerned you should reach your own conclusion as to whether this was brought about by the action of the man himself.

In this case the witness was not able to make a positive identification of the man whose head was being held up. He testified that he could not do so because the man's face was distorted and because the man was grimacing. It is for you to decide from all of the evidence in the case, including the testimony of the witness whether that is in fact the case.

In determining whether he was unfairly influenced in his in-court identification, among the things you should take into consideration is the fact that he did not make a positive identification at the lineup and you will have to determine therefore whether the lineup had any influence on him at all.

This is for you and you alone to determine. To sum up then with respect to the out-of-court identification procedures it is for you and you alone to determine whether the in-court identification made by the witnesses was unfiarly or unreasonably influenced by suggestions, express or implied, made to the witnesses, either at a photographic identification procedure or at a lineup and in determining

this you should consider the opportunity which the witness had to observe the defendant at the time of commission of the crime and whether or not the out-of-court identification procedure was such as to affect the in-court identification to such extent as to render the in-court identification unreliable.

I have referred several times during the charge to circumstantial evidence. Generally speaking there are two kinds of evidence, direct evidence and circumstantial evidence. A common example which is frequently given by courts of direct evidence is where you look out the window and you see the rain coming down, you have direct evidence that it is raining.

If, on the other hand, you are sitting in a closed room and a man comes in wearing a wet raincoat and shaking a wet umbrella, that is circumstantial evidence that it is raining outside.

You can base your verdict both on direct evidence and on circumstantial evidence, both are entitled to weight, to equal weight in determining your verdict. But the weight of both direct and circumstantial evidence is for you and you alone to determine.

One type of circumstantial evidence which we have here and on which the Government relies is the evidence

of flight, that is of leaving the scene of a crime. The Government refers to the flight which took place immediately following the robbery in the liquor store and they refer to the flight which happened when the Ohio State Patrol attempted to stop the car for speeding.

If you find that a defendant fled in an effort to avoid apprehension then such flight is a fact from which you can but need not necessarily infer a consciousness of guilt on his part. It is merely evidence which you may consider along with all of the other evidence in determining the guilt or innocence of the defendants, and the weight and significance of that evidence and of all of the other evidence is for you alone to determine.

I have talked about the credibility of the evidence. The evidence here consists of the oral testimony on the stand and also consists of the exhibits that were introduced in evidence.

How do you appraise the credibility of a witness? Well, to be short about it, you use your plain, every day common sense. You have seen the witnesses. You observed their conduct on the stand and their manner of testifying and whatever credit you give their testimony is determined by your observation of them, by the plausibility of what they said with respect to all of the other evidence in the case,

their relationship to the prosecution or the defense, that is their interest or lack of interest in the outcome of the case. An interested witness is not necessarily unworthy of belief.

His interest is merely one factor which you may consider in determining the weight and credibility to be given his testimony. If you find that a witness has testified falsely as to any material fact you may disregard all of his or her testimony or you may accept all of it or any part of it that you find worthy of belief.

A witness may be discredited or impeached by contradictory evidence or by evidence of prior inconsistent statements or prior inconsistent conduct. If you believe that a witness has been discredited it is solely for you to determine what weight to give his testimony in other respects.

You have taken an oath as jurors that you will find the facts fairly and impartially without prejudice and without sympathy and that you will follow the instructions that I give you as to the law. Part of your duty also is to leave entirely to the Court the question of the sentence to be imposed for any violation of the law that you find these defendants have committed. That duty must rest solely with the Court and in determining guilt or innocence

you should not speculate in your own mind what the punishment might be and you should not, for example, find the defendants not guilty on some counts merely because you think you have found them guilty on enough so that the punishment will be sufficient as to those counts, nor must you convict on some counts simply because you think some punishment is in order.

You must consider each and every count of the indictment separately and apart from all of the other counts and without regard to what you have done in finding a defendant guilty or not guilty with respect to the other counts. And in determining the guilt or innocence with respect to each count you should consider only the evidence that you have heard and seen with respect to the elements of that count and the instructions which I have given you as to the law.

Again, as I have told you several times, as to each element you must find the necessary facts beyond a reasonable doubt in order to convict a defendant with respect to the count of which that element is a necessary part.

I mentioned earlier that your verdict must be unanimous. However, the very purpose of your jury deliberation is to try to reach a unanimous verdict, to

try to convince one another if you can do that. This doesn't mean that each and every one of the members of the jury is not entitled to his or her opinion and to stick by it as long as that remains his or her opinion. It merely means that you should exchange your ideas. You should state what you believe and why and you should keep an open mind as to the opinions of all of your fellow jurors.

Once you have expressed an opinion you should not hesitate to change it if you become sincerely convinced that your original statement of opinion was incorrect after you have heard the opinions of others.

However, do not give up a point of view that you are sincerely convinced of merely because you are outnumbered. But do listen with an open mind to everything that is said in the jury room and remain willing to change an opinion no matter how strongly you might have expressed it at one time or another during the deliberation if you are convinced of a different position.

This is an unusually long charge because we have seven counts in the indictment and there may be many things that I have said that were not clear to you when I said them or which have escaped you or will have escaped you during your deliberations.

If you want to have any part of the charge

explained or if you want to have any of it repeated, if you will send a note out to me through the marshal who will be stationed at the door of the jury room, I will be glad to repeat or explain any part of the charge.

By the same token if you can't remember the testimony of a particular witness and want to have it repeated if you will send out a note through the marshal the court reporter will repeat the part of the testimony about which you are interested. Likewise, if you want to see any of the exhibits that are in the case if you will request those they will be sent in to you for your examination.

May I see counsel at the side bar, please.

(At the side bar.)

THE COURT: Any exceptions or suggestions?

MR. WOHL: If your Honor please, I except to a remark your Honor made earlier in the charge referring to the guilt or innocence of each defendant. I think it should be guilt or lack of guilt of the defendant rather than guilt or innocence.

THE COURT: All right.

MR. WOHL: In reference to Count 6 your Honor referred to they may infer participation in the original theft. I take exception to that.

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THE COURT: Counsel have suggested several clarifications to my charge without waiting for the jury to do so, and so I am going to clarify or amplify it in several respects.

First, at one point in the charge I apparently referred to the guilt or innocence of the defendants. What I should say is the guilt or lack of guilt. The Government has the burden of proof of establishing that the defendants are guilty. If the Government fails in that burden of proof with respect to any of the elements which make up a particular count, you must return a verdict of not guilty. The defendants do not have to prove their innocence, they are presumed to be innocent until they are proven guilty.

Now, at one point in the charge with respect to interstate transportation of the stolen firearm, and interstate transportation of the stolen automobile, I stated that you could infer from the recent possession of the firearm or automobile, if you find that it was recently stolen, that the defendants knew that it was stolen, and also that they participated personally in the theft.

I am going to instruct you to disregard what I said about personal participation in the theft.

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That is not really an important factor in the case. What you may do is, if you find that the defendants were in possession of a firearm or an automobile which was recently stolen, as I defined the term to you, then you may infer that they knew that it was stolen. You need not consider whether or not they personally participated in the theft, because that is not a necessary element of the crime of interstate transportation of stolen property.

Now, we have here several weapons about which there has been testimony, and at least two of the weapons are in evidence. We have, for example, Agent Shea's gun. I have instructed you as a matter of law that that is a firearm within the definition of the Federal Criminal Code.

We have also in evidence the CO_2 actuated pistol, automatic pistol, which was found in the automobile which was stopped in Ohio. I am instructing you as a matter of law that that CO_2 actuated automatic pistol is not a firearm because it is not powered by explosive charges. However, I do instruct you as a matter of law that it is a dangerous weapon.

So you will have to look at the counts of the indictment which I am going to hand to you on agreement of

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counsel, and as to those charges or counts which involve the firearm, you must find that the revolver of Agent Shea was involved.

For example, if you are talking about theft of a firearm, then it would be the theft of Agent Shea's gun. If you are talking about use of a firearm, then it must have been Agent Shea's gun that was used after it was taken away from him by the defendant in question, if you find that it was in fact taken away from him by the particular defendant.

As I say, I am going to give you, on the agreement of all counsel involved, the actual indictment. I am going to take off of it the first two pages and give you only the actual indictment itself. The pages that I took off are merely the summary sheets which are attached in the Clerk's Office, and to give you the actual indictment itself. And you can see which of the counts refer to firearms and which refer to dangerous weapons.

In the summation of the Government, there was reference to the beating of Mr. McArdle. You need not consider, indeed you should not consider, any testimony or any statement of counsel as to what was done to Mr. McArdle, because that is not the Federal offense that is

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being charged here. That is the responsibility of the State law enforcement officials.

It has been stipulated that at the time that Agent Shea entered the liquor store a felony or a violent misdemeanor was being committed and that this was apparent to him at the time he entered. You need not consider what that felony was or what that violent misdemeanor was. And you should not do so in determining the guilt or lack of guilt of these defendants with respect to the Federal offenses charged here.

Count 2 of the indictment contains a number of elements. One of the elements is the assault on a Federal officer in the line of his duty. You must find beyond a reasonable doubt that the defendant in question knowingly, willfully and unlawfully assaulted a person. He need not know that he is a Federal officer or that the Federal officer is acting in the line of duty, but you must find that the assault was knowing and willful as opposed to accidental or unintentional.

These are all of the supplemental charges. I hope they have not compounded the confusion. As I say, I will be at your call if you want further clarification or repetition of any part of the charge.

Will you swear the marshal, please?

(Marshal sworn.)

THE COURT: Now is the time to part company with our two alternate jurors. The other twelve jurors are going into the jury room to deliberate their verdict. We have kept you here for a very important reason, namely that if any of the other jurors had become ill or had to be excused for any other eason, we did not want to try the case all over again, as we would have to do if we did not have a couple of alternate jurors to take the plaœ of jurors that have been excused.

So I thank you very much for the important function that you have performed, for your attention and for all the time that you have spent. You may be excused now.

(Two alternature jurors excused.)

THE COURT: I want to say one final word to the other jurors.

I have cautioned you over and over again during the trial not to discuss the case with your fellow jurors or with anyone else. I am going to relieve you of half of that responsibility now. You are supposed to discuss the case with your fellow jurors, but the other half of injunction continues in effect. You are not to discuss the case with anyone else until you have returned a final

verdict and have come into court and reported it.

Also, do not discuss the case with any of your fellow jurors unless all twelve of the jurors are present. We do not want two going off and coming to a conclusion independently of the others.

Thank you very much for your attention and we will be available if you need us.

[At 4:35 p.m., the jury retired to deliberate.]

1/31/75

I certify that I have caused a copy of the within appendix to be served on the U.S. Attorney SDNY

E. Thomas Boyle